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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-280

In the Matter of the Compensation of
WILLIAM WISHERD,
Appellee,

v.

PAUL KOCH VOLKSWAGEN, INC.,
Appellant.

ON APPEAL FROM THE COURT OF APPEALS OF OREGON

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JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Court of Appeals of the State of Oregon, entered on February 14, 1977, affirming the decision of the Circuit Court of Clackamas County, Oregon. The Supreme Court of the State of Oregon denied review on May 24, 1977. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Court of Appeals of the State of Oregon is reported at 28 Or. App. 513. The order of the Supreme Court of Oregon denying review is reported at 278 Or. 393. A copy of the Court of Appeals' opinion is attached hereto as Appendix A.

JURISDICTION

In the courts below the appellant drew into question the validity of an Oregon statute, ORS 656.313, on the ground of its being repugnant to the Constitution of the United States, and the decision of the Court of Appeals of the State of Oregon was in favor of the validity of the statute. The judgment of the Court of Appeals of the State of Oregon was entered on February 14, 1977. The Supreme Court of the State of Oregon denied review on May 24, 1977. A Notice of Appeal to the Supreme Court of the United States was filed in the Court of Appeals of the State of Oregon on July 28, 1977. The jurisdiction of the Supreme Court of the United States to review this decision by appeal is conferred by 28 U.S.C. § 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case:

Hicks v. *Miranda*, 422 U.S. 332, 343-345 (1975);
Michigan-Wisconsin Pipe Line Co. v. *Calvert*, 347 U.S. 157, 159-161 (1954);
American R. Express Co. v. *Levee*, 263 U.S. 19, 20-21 (1923).

QUESTION PRESENTED

Does ORS § 656.313, which precludes employers who prevail on appeal from recovering funds they were improperly required to pay to employees as workmen's compensation, violate the Equal Protection Clause of the Fourteenth Amendment?

STATUTES INVOLVED

ORS § 656.313 is set forth in Apendix B hereto.

STATEMENT

Under the Oregon Workmen's Compensation Law, ORS §§ 656.001-656.794, employees are entitled to receive compensation from their employers for work-related injuries. ORS § 656.017. Both employers and employees are entitled to a hearing before a referee designated by the State Workmen's Compensation Board to resolve disputes over whether an injury is work-related. Both employers and employees may obtain review of the referee's decision by the Compensation Board. ORS § 656.295. If dissatisfied by the Board's decision, both employers and employees may obtain judicial review. ORS §§ 656.298-656.301.

If compensation is denied by the Board but a court later determines that an injury was work-related, then the injured employee is entitled to full retroactive compensation. Thus, an injured employee is entitled to the full benefit of a successful ruling on appeal.

If, however, a compensation award is granted at the administrative level but subsequently reversed by a court, the employer is not entitled to recoup compensation payments that were made pending judicial review. ORS 656.313(2). Nor does the employer have

the option of withholding payment pending review since the statute provides that the filing of an appeal does not stay payment of compensation to a claimant. ORS 656.313(1).

The net effect of this statutory scheme is that an employer can be forced irrevocably to pay "compensation" to an injured employee even though a court ultimately determines that the employee was not lawfully entitled to receive such payment.

The facts of this case illustrate the potential for unfairness inherent in the Oregon scheme. Here, the appellee became disabled by heart disease on or about March 1, 1974. His claim for compensation was granted by the Board-appointed referee and affirmed by the Board and the Circuit Court. However, the Oregon Court of Appeals reversed, holding that the appellee had not established that work-related stress was a contributing cause of his injury. *Wisherd* v. *Paul Koch Volkswagen, Inc.*, 27 Or. App. 601, 557 P.2d 55 (1976), attached hereto as Appendix C. The Oregon Supreme Court denied review. Thus appellant was successful on the merits of this issue.

Under ORS § 656.313, however, the appellant was not entitled to reimbursement for sums it was erroneously required to pay to the appellee. In this collateral action, appellant contended that ORS 656.313 violated the Equal Protection Clause of the Fourteenth Amendment by imposing discriminatory restrictions upon the statutorily granted right of appeal. This argument was raised before the appointed referee, the Board, the Circuit Court for Clackamas County, and

the Oregon Court of Appeals. The Court of Appeals ruled that ORS 656.313 did not violate the Equal Protection Clause of the Fourteenth Amendment. The Oregon Supreme Court denied review.

THE QUESTION IS SUBSTANTIAL

It is well established that the Fourteenth Amendment does not require a state to provide a system of appellate review. *E.g.*, *Ortwein* v. *Schwab*, 410 U.S. 656, 660 (1973). But if a state does accord appellate review, it must do so in an even-handed fashion. *E.g.*, *Griffin* v. *Illinois*, 351 U.S. 12, 18 (1956); *Lane* v. *Brown*, 372 U.S. 477, 484 (1963); *Long* v. *District Court of Iowa*, 385 U.S. 192 (1966); *Lindsey* v. *Normet*, 405 U.S. 56 (1972).

Thus, in *Lindsey* v. *Normet*, *supra*, this Court held that a provision in the Oregon Forcible Entry and Wrongful Detainer (FED) Statute requiring a defendant to post an appeal bond equal to twice the rental value of rented property from the time of commencement of the action to final judgment violated the Equal Protection Clause of the Fourteenth Amendment. 405 U.S., at 79. The court reasoned that because this provision imposed on FED defendants "a substantial barrier to appeal faced by no other civil litigant in Oregon," it was unconstitutional.

The rationale of *Lindsey* v. *Normet*, *supra*, is applicable here. Defendants in contested workmen's compensation cases encounter a "substantial barrier to appeal faced by no other civil litigant in Oregon"—they cannot win. The inter-action of the no-stay pro-

vision of ORS 656.313(1) and the no-recoupment provision of ORS 656.313(2) preclude successful defendants from recovering funds that were erroneously paid to claimants.

Indeed, the "barrier to appeal" here is even more drastic than the double-bond requirement in *Lindsey* v. *Normet, supra.* The latter merely "doubled the stakes when a tenant seeks to appeal an adverse judgment in an FED action," 405 U.S., at 79, thus chilling the statutory right to appeal. The no-recoupment provision here completely eviscerates the employer's statutory right to appeal by denying him the fruits of his victory if he prevails.

This insurmountable barrier to meaningful appellate relief is an isolated anomaly in Oregon law. To paraphrase the Court's opinion in *Lindsey* v. *Normet, supra,* "[n]o other appellant" encounters such an absolute obstacle to relief. 405 U.S., at 78. Certainly *employees* appealing adverse rulings on compensability issues face no analogous obstacle to review.

Moreover, this absolute "barrier to appeal," like the double-bond requirement in *Lindsey* v. *Normet, supra,* is not "reasonably tailored to achieve [the] end [of the state statute/." The purpose of the Oregon Workmen's Compensation Act is to provide compensation for *work-related* injuries. The statute defines a "compensable injury" as "an accidental injury, or accidental injury to prosthetic appliances, *arising out of and in the course of employment* requiring medical services or resulting in disability or death; . . . ." (Emphasis added). Yet the no-recoupment provision

results in the retention by employees of funds improperly awarded them for non-work-related injuries.

This result is by no means necessary to enable the state to further the policy objectives of "provid[ing] injured employees with a means of support and with the means to pay medical expenses while an employer appeals an adverse decision." Opinion of Court of Appeals, Appendix A, p. A-4. A no-stay provision alone would fully serve that objective. And to the extent the state wishes to mitigate the hardship that might result from requiring employees to repay sums improperly awarded to them as compensation, it may do so by providing that employers shall recoup improper payments solely from a state-created fund.*

The lower courts have divided on the issue of the constitutionality of provisions similar to Oregon's no-recoupment statute, as the Court of Appeals acknowledged. The issue clearly is substantial under the Court's ruling in *Lindsey* v. *Normet, supra* and plenary consideration is thus appropriate.

Respectfully submitted,

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August 22, 1977

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* This approach is followed in at least three states. See Kan. Stat. Annot. §§ 44-556(d) (Supp. 1975) (reimbursement from a "workmen's compensation fund"); N.Y. Work. Comp. Law § 23 (McKinney Supp. 1976) ("administration expenses fund"); Ohio Rev. Code Annot. §§ 4123.51.9 (1975) ("surplus fund").

APPENDIX A

OPINION OF THE COURT OF APPEALS OF THE STATE OF OREGON

In this workmen's compensation case, employer appeals from an order compelling it to pay certain benefits to claimant pending disposition of employer's appeal from a decision of the Board that claimant was permanently and totally disabled.

Claimant became disabled by heart disease on or about March 1, 1974. His claim for compensation was granted by the referee and the Workmen's Compensation Board (Board), and the award was affirmed by the circuit court. This Court reversed, holding that claimant had not established that work-related stress was a contributing cause of his injury. *Wisherd* v. *Paul Koch Volkswagen*, 27 Or. App. 601, 557 P.2d 55 (1976), Sup. Ct. *review denied* (1977). While the appeal to this court was pending, claimant initiated proceedings before the Board asserting that employer had reimbursed claimant only for compensation and expenses which occurred after the referee's decision and requesting that the Board require employer to pay compensation and expenses which occurred after the date of the disability but prior to the referee's decision. The referee granted the claim, and his decision was affirmed by the Board and by the circuit court.

ORS 656.313 provides:

> "(1) Filing by an employer or the State Accident Insurance Fund of a request for review or court appeal shall not stay payment of compensation to a claimant.

> "(2) If the board or court subsequently orders that compensation to the claimant should not have been allowed or should have been awarded in a lesser amount than awarded, the claimant shall not be obligated to repay any such compensation which was paid pending the review or appeal."

Employer asserts first that ORS 656.313 is an unconstitutional abridgement of the judiciary's power to review administrative decision making in that the referee's assessment of the compensation due immediately can never be meaningfully reviewed by a court. It is established, however, that so long as a state provides an evidentiary hearing which comports with the minimum requirements of due process, it need not provide any appellate review of administrative decisions. *E.g.*, *Ortwein* v. *Schwab*, 410 U.S. 656, 93 S. Ct. 1172, 35 L. Ed. 2d 572 (1973). *See generally Griffin* v. *Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956). Here the legislature has chosen to provide for judicial review of only certain aspects of a decision of the referee and the Board, and has excluded from the courts the power to compel the repayment of benefits received pending appeal. This decision was within the legislature's constitutional authority.

Employer maintains that since it cannot recover the monies paid to a claimant pending the appeal even though a court might later rule that the money was not owed, ORS 656.313 works an unconstitutional taking of its property without due process of law. In this regard, ORS 656.313 cannot be viewed in isolation;

it must be considered as part of the entire workmen's compensation system. The workmen's compensation system compromises many interests of both employers and employes out of the belief that an alternative to judicial determination of employment-related injury claims is necessary. Employes must forego, inter alia, the right to sue in tort for injuries occurring in the course of employment but receive in exchange the elimination of fault as a basis for compensation. Employers receive the benefit of limited liability for compensable accidents but are required on the other hand to assume liability for a greater number of injuries. These and many other balances are among those struck in the *quid pro quo* format of the workmen's compensation system—balances which have long ago been held constitutional. *New York Central R.R. Co.* v. *White*, 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667, 1917 D. Ann. Cas. 629 (1917). ORS 656.313, when viewed within the context of the entire workmen's compensation law, does not constitute taking without compensation.[1]

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[1] Statutes either identical or similar to ORS 656.313 have been almost unanimously held constitutional by other courts: *Tompkins* v. *Rinner Construction Co.*, 196 Kan. 244, 409 P.2d 1001 (1966); *St. Paul Fire & Mar. Ins.* v. *Treadwell*, 263 Md. 430, 283 A.2d 601 (1971); *Hartford Accident & Indem. Co.* v. *Duvall*, 113 N.H. 28, 300 A.2d 732 (1973); *Schwartz* v. *Delaware National Bank*, 39 App. Div. 2d 796, 332 N.Y.S.2d 206 (1972); *see Ahmed's Case*, 278 Mass. 180, 179 N.E. 684, 79 A.L.R. 669 (1932) (statute requiring employer to pay claimant's attorney fees and other costs on appeal regardless of eventual disposition constitutional); *Sassarro* v. *Wright, & c., Corp.*, 24 N.J. Misc. 57, 46 A.2d 52 (1946) (statute providing that over-payments to employe could not be recovered constitutional); *Brakus* v. *Dept. Labor & Ind.*, 48 Wash. 2d 218, 292 P.2d 865 (1956) (same). *But see Chrysler Corp.* v. *Comp. Comm.*, 301 Mich. 351, 3 N.W.2d 302 (1942).

Employer next argues that ORS 656.313 violates the Equal Protection Clause of the Fourteenth Amendment by imposing "a discriminatory burden upon the statutorily granted right of an employer to appeal adverse decisions . . . ." Employer concedes, however, that ORS 656.313 must stand if the statute rationally furthers a legitimate state interest—employer argues only that such an interest does not exist. Such an interest is self-evident from the face of ORS 656.313. Often when an employe is injured, it may be years before the claim is finally adjudicated. ORS 656.313 seeks to provide injured employes with a means of support and with the means to pay medical expenses while an employer appeals an adverse decision. The furtherance of this interest adequately supports the constitutionality of ORS 656.313.

Employer's final argument, not supported by any cited authority, is that ORS 656.313 has no applicability to benefits which arise after the date of injury but before an order requiring the payment of compensation is entered. The clear intent of ORS 656.313 is to require the immediate payment of all compensation due by virtue of the order when the order is entered. Compensation, as defined by ORS 656.005(9), includes medical expenses of the type at issue here:

> " 'Compensation' includes all benefits, including medical services, provided for a compensable injury . . .,"

Affirmed.

APPENDIX B

ORS 656.313

656.313 Employer or fund request for board or court review shall not stay compensation. (1) Filing by an employer or the State Accident Insurance Fund of a request for review or court appeal shall not stay payment of compensation to a claimant.

(2) If the board or court subsequently orders that compensation to the claimant should not have been allowed or should have been awarded in a lesser amount than awarded, the claimant shall not be obligated to repay any such compensation which was paid pending the review or appeal.

APPENDIX C

PRIOR OPINION OF COURT OF APPEALS OF OREGON ON ISSUE OF COMPENSABILITY

The employer appeals from a circuit court order affirming hearings referee and Workmen's Compensation Board decisions awarding compensation to claimant on a claim arising out of a disabling heart disease. The issue, as usual, is causation.

Claimant suffered from congenital aortic heart disease and hyperlipidemia, an inherited hypercholesterol condition. He was not aware of the heart condition until March 1, 1974, the day after his employment was terminated, when symptoms he had attributed to a stomach ailment were diagnosed as referable to heart disease. On March 14, 1974, two weeks after the heart condition was discovered, claimant underwent an aortic valve replacement and exploration of the right coronary artery.

The contention in this case essentially is that the claimant experienced an increasing lack of strength and some abdominal pain over the last few months of his employment, and that job stress relating to claimant's concern over his employer's decrease in car sales and his efforts to secure more used compact cars to sell were material contributing factors in the progression of his heart disease. The claimant is supported in his theory by Dr. Shepherd, his treating physician, who concluded:

> "After reading the transcript of Mr. Wisherd's hearing, there is no doubt in my mind that stress has contributed significantly to his problem. It is true, however, that the ground work for Mr. Wisherd's problem was laid by congenital aortic valve disease and hyperlipidemia (hypercholesterolemia) which is also inherited. While it is my professional opinion that stress is undoubtedly a contributing factor to Mr. Wisherd's problem, I am unable to ascribe a specific percentage to the stress involved."

A reviewing cardiologist, Dr. Griswold, disagreed. In a letter to the employer's counsel, Dr. Griswold wrote:

> "Evaluating all of the data furnished, including reading over carefully the transcript, there is little question that he was under periods of emotional stress. However, there is no data to indicate a particular stressful situation which resulted in any unusual symptoms. His main problem was that of serious aortic stenosis which is a narrowing of the aortic valve probably because of congenital malformation of the aortic valve. He also has coronary artery disease. However, there is nothing in the work history of this individual to justify the conclusion that the aortic stenosis or coronary artery disease was accelerated or contributed to by his work activity."

In order to establish a compensable heart case, the claimant must establish legal causation and medical causation. *Coday* v. *Willamette Tug & Barge*, 250 Or. 39, 440 P.2d 224 (1968).

In *Anderson* v. *S.A.I.F.*, 5 Or. App. 580, 485 P.2d 1236 (1971), this court overruled a line of cases based on the principle that where the claimant has a prior heart disease, it must be established that the employment contribution takes the form of an exertion

greater than that of nonemployment life and reaffirmed the notion that 'claimant's usual exertion in his employment is enough to establish the necessary legal casual connection." 5 Or. App. at 587, citing *Coday* v. *Willamette Tug & Barge, supra. See also,* 1A Larson, Workmen's Compensation Law 7-169, 7-177 to 7-181, § 38.83 (1973).

Medical causation is conceptually elusive, as the divergent medical opinions in this case attest. Medical causation is established by expert medical testimony to the effect that stress or exertion experienced in the course of employment constituted a material contributing factor producing the heart condition. *Riutta* v. *Mayflower Farms, Inc.*, 19 Or. App. 278, 527 P.2d 424 (1974), Sup. Ct. review den. (1975).

We conclude that the claimant has not established by a preponderance of the evidence that his work-related stress was a material contributing cause of his heart condition. Our conclusion is influenced by the following factors: (1) claimant had a preexisting congenital heart defect; (2) there was no infarction or similar trauma which precipitated the final heart condition; and (3) there was not a sufficient showing of a particular stressful situation which produced the condition necessitating the described surgical procedures. Where the above factors are present, stronger evidence on the issue of causation is required. *See, Schwehn* v. *SAIF*, 17 Or. App. 50, 520 P.2d 467, Sup. Ct. review den. (1974).

PROOF OF SERVICE

I hereby certify that I served the foregoing Jurisdictional Statement on the counsel for Appellee on this ..... day of August, 1977, by mailing to Mark Braverman, Esq., Pozzi, Wilson & Atchison, 910 Standard Plaza, Portland, Oregon 97204, three true and correct copies thereof, certified by me as such. Said Jurisdictional Statement was placed in a sealed envelope and deposited in the United States mail at Portland, Oregon with postage fully prepaid. I further certify that all parties required to be served have been served.

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